

*United States Court of Appeals
for the Second Circuit*



APPELLEE'S BRIEF

76-1400

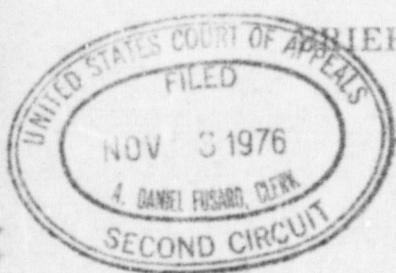
IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT L. MONIN, a/k/a TODD R. MONI,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED
STATES DISTRICT COURT FOR THE WESTERN DISTRICT
OF NEW YORK.



BRIEF OF APPELLEE

RICHARD J. ARCARA,
United States Attorney,
Western District of New York,
Attorney for Appellee,
502 United States Courthouse,
Buffalo, New York 14202.

ROGER P. WILLIAMS
Assistant United States Attorney,
of Counsel.

UNITED STATES COURT OF APPEALS
CLERICAL STAMP
10 CENTER ST., BUFFALO, N.Y. 14202
7-1400-1400

INDEX.

	Page
Preliminary Statement	1
Statement of Facts	2
Suppression of Hearing	3
Argument	5
Both Judge Elvin's Decisions were correct	5
A. Monin's activity falls within the purview of the statute	5
B. Monin's oral admission and written con- fession are admissible	8
Conclusion	9

TABLE OF CASES.

DeCorter v. FTC, 244 F.2d 270 (1957)	7
Kropp Forge Company v. Employers Liability Assurance Corporation, 159 F.2d 536 (1947)	7
Rose v. United States, 227 F.2d 448 (10th Cir. 1955) . .	7
United States v. Boston, 508 F.2d 1171 (2d Cir. 1974) .	9
United States v. Brownstein, 521 F.2d 459 (2d Cir. 1975) .	9
United States v. Green, 494 F.2d 820 (5th Cir. 1974), rehearing denied, 497 F.2d 1368, cert. denied, 419 U.S. 1027	6,7,8
United States v. Johnson, 327 U.S. 106 (1946)	9
United States v. Mikelberg, 517 F.2d 246 (5th Cir. 1974), rehearing denied, 521 F.2d 816, cert. denied U.S. (1976), 96 S.Ct. 1104	6,7,8

II.

Page

STATUTES.

Title 15, United States Code:	
Section 1644	6
Section 1644(a)	1,5
Section 1644(e)	1
Title 18, United States Code:	
Section 1343	7

MISCELLANEOUS.

Black's Law Dictionary	7
------------------------------	---

IN THE
United States Court of Appeals

For the Second Circuit

No. 76-1400

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT L. MONIN, a/k/a
TODD R. MONI,
Defendant-Appellant.

On Appeal from a Judgment of Conviction of the United
States District Court for the Western District of New York.

BRIEF OF APPELLEE

Preliminary Statement

On November 12, 1975 a two-count indictment was returned to the Court charging this defendant with violations of Title 15, United States Code, Sections 1644(a) and (e). (Appellant's brief pp. 1-3).

On December 4, 1975, the defendant moved to dismiss the indictment on the ground that those sections did not encompass the factual posture of the present case, to wit, representations by Monin that he was the holder of a certain American Express credit card. Then on March 29, 1976 he further moved to suppress certain statements made by him as

well as physical evidence seized from his apartment (Gov. Ex. 1), the latter now abandoned (Appellant's brief p. 313).

By Decision and Order dated June 21, 1976 (A5-10)¹ District Court Judge John T. Elvin denied Monin's motion to dismiss on the ground urged. By further Decision and Order dated June 28, 1976, the Judge, following a suppression hearing held on June 28, 1976, denied, in all respects, defendant's motion to suppress (A32-35).

On July 6, 1976 Monin then entered a plea of guilty to Count I of the indictment, reserving his right to appeal the two Court decisions, a procedure previously approved by this Court.

On July 26, 1976, Monin was sentenced to the custody of the Attorney General for a period of two years. His notice of appeal was timely filed.

Statement of Facts

As set forth in a Pre-Trial Statement filed by the government on February 24, 1976 (G1-7)² Monin, during the period of time set forth in Count I of the indictment called Allegheny Airlines in Buffalo, New York and booked various flights. He booked flights in the names of Todd R. Moni, Michael Mattison and James M. Mattison. On each occasion he told the local Allegheny Airlines representatives that he was the holder of a certain American Express Credit Card and asked that the tickets ordered be charged to his credit card and mailed to him at 1331 Clinton Street, Buffalo, New York. The tickets were then mailed to him from Pittsburgh, Penn-

¹ Reference to appellant's appendix.

² Reference to Government's appendix.

sylvania. The tickets used by him had an aggregate value of approximately \$5,900. During the same period of time, Monin also ordered merchandise from various mail order houses throughout the country, having a retail value of \$690.52. Here, Monin ordered the merchandise by the mails and requested the mail order house to charge it to an American Express credit card.

At no time was Monin the holder of an American Express credit card nor were any of the credit card numbers utilized by him in existence or assigned to another subscriber.

Suppression of Hearing

The proof adduced at the suppression hearing was that on September 10, 1975, Postal Inspector Clifton M. Harm, Jr., had information that an individual by the name of Todd R. Moni was obtaining and using Allegheny Airline tickets and charging them to a non-existent American Express credit card (G8-9). Armed with this information, Harm went to 1331 Clinton Street, Buffalo, New York to seek out Todd Moni. Harm arrived there at approximately 2:00 in the afternoon, knocked on the door and was admitted by Monin. Harm immediately identified himself and his colleague, Leroy Traub, as Postal Inspectors. Each exhibited his credentials to Monin (G9).

Harm then advised Monin that he and Traub wished to speak to him about his ordering of Allegheny Airline tickets (A16). Harm then immediately recited the full panoply of *Miranda* warnings by reading verbatim from a standard Advisal of Rights and Waiver Form (G10, G26). Harm then gave the form to Monin and asked him to read it. Monin looked at the form and said that he understood. Harm further advised

him that by signing the form he did not give up his right to stop answering questions at any time (A17, A20). The inspector then told Monin that he wished to speak to him about his knowledge of an individual by the name of Todd R. Monin obtaining and using Allegheny Airlines tickets over the past year and charging those tickets to certain non-existent American Express credit cards. At first Monin denied any knowledge, then stated that he did it, that he knew it was wrong and that he was glad it was over (G11, G19).

At the same time, the agents observed scattered around the floor of the living room "airlines tickets, with the return address of Allegheny Airlines, reserved seat tickets, ticket envelopes such as you would receive when you check in on a boarding date, things of that nature" (A18, Gov. Ex. 1). At that point Harm asked Monin for permission to search. He told Monin that he was seeking permission, that Monin did not have to give it and that anything found could be used against him in Court. Monin then gave his permission (G12-13, G20).

While Traub collected those items from the living room, Harm obtained handwriting specimens from Monin (G13). At approximately 2:30 p.m., Monin said it was his normal practice to now leave for work. Harm gave him permission provided he agreed to come to the Postal Inspector's Office the next day to further discuss the matter. Monin said he would (G14-15). Harm further stated that on this occasion, Monin at no time appeared to him to be under the influence of alcohol or drugs and that he in all respects appeared to be normal (G16). He also stated that he never threatened Monin nor made any promises to him (G16).

The following day Monin called and said he was sick and asked if he could appear the next day. On September 12, 1975,

he appeared at the Postal Inspectors Office (G15). Harm again fully advised him of his rights pursuant to *Miranda* by reading from the same standard form and by giving it to Monin to read. Monin did, said he understood his rights and signed the waiver portion of the form (G16-17, G27). Monin then gave a handwritten statement admitting that he ordered the airline tickets and merchandise from various mail order houses by requesting the vendors to charge the tickets on the one hand and the merchandise on the other hand to an American Express credit card which he claimed he held (G18, G28-29).

Monin then took the stand and admitted that everything Inspector Harm said was true (A26). He also testified that he was familiar with the requirements of *Miranda* warnings as a result of watching television (A27-28). In a response to a question by the Court, he said he knew what he was signing, knew what it meant and understood it (A29). He also testified that he realized he was suspected of criminal activity (G25). Lastly, he admitted his complicity (G21-24, G28-29).

ARGUMENT

Both Judge Elvin's Decisions were correct.

A. Monin's activity falls within the purview of the statute.

Monin claims that his false oral representations to Allegheny in ordering and using approximately \$5,900 in airline tickets, that he was the holder of a certain American Express credit card, requesting the airline to charge the tickets to that card and in making the same representations, in writing, to various mail-order houses are not proscribed by Title 15, United States Code, § 1644(a), which makes it a crime to:

Knowingly, in a transaction affecting interstate or foreign commerce, use or attempt or conspire to use any . . . fictitious credit card to obtain money, goods, services, or anything else of value which within any one year period has a value aggregating \$1,000 or more.

Simply put, Monin claims that the term "fictitious" includes only two situations. One, an existing fictitious credit card wherein the fiction refers not to the fiction of the existence of a card, rather, to a fiction with regard to the existence of a bona fide lender whose credit backs the use of the card. Two, an existing credit card wherein the holder is fictitious.

The import of the Statute, however, conveys an intent to criminalize fraudulent schemes in which credit cards and/or their equivalents are employed with an intended consequence of defrauding an unsuspecting party. See *United States v. Mikelberg*, 517 F.2d 246, 250 (5th Cir. 1974), rehearing denied, 521 F.2d 816, cert. denied . . . U.S. . . . (1976), 96 S.Ct. 1104. Certainly, the term "fictitious" would include the situations hypothesized by Monin; however, the plain and ordinary usage of the word connotes greater latitude which cannot be read out of the Statute without denying Congressional intent. As the Court said in *United States v. Green*, 494 F.2d 820, 826 (5th Cir. 1974), rehearing denied, 497 F.2d 1368, cert. denied, 419 U.S. 1027, §1644 (the present Statute's predecessor) was intended to insure and expand the Government's capacity to deal with fraudulent credit card schemes and in nowise meant to restrict prosecutorial tools. And while there is a paucity of legislative history and case law interpreting this Statute and its predecessor, the Supreme Court has pointed out that the rule of lenity in the construction of a penal code "in no wise implies that language used in criminal statutes should not be read with a saving grace of common

sense with which other enactments, not cast in technical language are to be read". *Mikelberg, supra*, at 252. Black's Law Dictionary defines "fictitious" as meaning: "feigned, imaginary, not real, false, not genuine, *non-existent*" [emphasis added]. Certainly, Congress could not have intended to limit the common usage of "fictitious" in § 1644 in the manner now sought. Rather, an obvious definition of "fictitious credit card" would include a situation where a non-existent card is used in a fraudulent manner.

Monin's reliance on 18 United States Code, § 1343 as an indication that Congress could not have meant the term "fictitious" to include the present situation, is misplaced. First, that section proscribes only false pretenses transmitted by wire (telephone) in interstate or foreign commerce. See, e.g., *Rose v. United States*, 227 F.2d 448 (10th Cir. 1955). Here, there is no interstate telephone communication, merely an intra-state telephone communication between Monin and Buffalo, New York and Allegheny Airlines in Buffalo, New York. Secondly, even if Monin's conduct could be construed to violate Section 1343, a single act may violate more than one law and in such a situation the Government may proceed under either. *Green, supra*, at 826-827.

It is another basic principle of statutory construction that Courts will not impute to the legislature an intent to produce an absurd result. *Mikelberg, supra*, at 252. In other contexts Courts have refused to adopt a narrow and specific meaning to the word "fictitious". *Kropp Forge Company v. Employers Liability Assurance Corporation*, 159 F.2d 536 (1947) (defining a fictitious payee); *DeCorter v. FTC*, 244 F.2d 270, 281 (1957) (defining fictitious prices).

Above all, logic dictates that Monin's construction of the Statute be rejected. A credit card simply represents a line of

credit offered to a party by a lending institution. There is nothing inherently valuable about the card itself; the value which inures to the credit card holder comes from the extension of the line of credit which the card represents. In an over-the-counter transaction, presentation of the tangible credit card merely offers the accepting party an assurance that the card represents an existing line of credit. However, the privileges granted to a person holding a line of credit is not limited solely to the over-the-counter, face-to-face, credit encounter. The Court might take judicial notice of the fact that a substantial number of credit sales transactions are done by means of telephone, wherein the parties involved rarely, if ever, see each other, and no exchange of a tangible credit card takes place. In such situations the tangible plastic card serves no function whatsoever.

The important factor to be considered is that the line of credit has been fraudulently used. *Mikelberg, supra*; *Green, supra*. The fraud in such a situation is no different from that committed when a fictitious plastic card, that is, a card containing the name of a fictitious lending institution, is employed in an over-the-counter transaction. In those situations the perpetrator of the fraud represents to an unsuspecting party a falsehood, to wit, that he has a valid and existing line of credit with a lending institution.

For these reasons, the Court's decision (A5-10) that the appellant's conduct fell within the proscription of the Statute was correct. The motion to dismiss on the ground urged was properly denied.

B. Monin's oral admission and written confession are admissible.

Monin's oral admission on the afternoon of September 10, 1975 that he, in fact, did order and use airline tickets direct-

ing Allegheny Airlines to charge those tickets to a credit card which he did not hold, came well after Inspector Harm fully advised him of his rights pursuant to *Miranda* and after he executed the waiver of those rights (A17, A20, G10, G26). Likewise, at the Postal Inspector's office, Monin's written confession came well after he was advised of his rights pursuant to *Miranda* and after he had executed the waiver of those rights (G16-17, G27-29). At the very least, the Judge's findings (A32-35) are not totally unsupported by the evidence. In such circumstances where "it does not clearly appear that the findings are not supported by any evidence" an Appellate Court should not intervene. *United States v. Johnson*, 327 U.S. 106, 112 (1946); *United States v. Boston*, 508 F.2d 1171, 1179 (2d Cir. 1974); *United States v. Brownstein*, 521 F.2d 459, 463 (2d Cir. 1975).

Conclusion

For all of the above reasons, the judgment of conviction should, in all respects, be affirmed.

Respectfully submitted,

RICHARD J. ARCARA,
United States Attorney
Western District of New York,
502 United States Courthouse,
Buffalo, New York 14202.

ROGER P. WILLIAMS,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF SERVICE BY MAIL

RE: U.S.A. vs
Robert L. Monin, a/d/a/ Todd R.
Moni
State of New York)
County of Genesee) ss.:
City of Batavia)
No. 76-1400

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 1st day of November, 1976
I mailed 10 copies of a printed Appellee in Brief & Appendix
the above case, in a sealed, postpaid wrapper, to:

10 copies by Air Mail, Special Delivery to:
A. Daniel Fusaro, Clerk,
United States Court of Appeals, Second Circuit
New Federal Court House, Foley Square
New York, New York 10007

2 copies to: Christopher Jones, Esq.
290 North Street
Buffalo, New York 14201

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U.S. Attorney, Att: Roger P. Williams, Asst. U.S. Attorney
502 U.S. Courthouse, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

1st day of November, 1976

Patricia A. Lacy

Notary Public, State of New York
My Commission Expires March 30, 1977.